

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Mailed:  
December 12, 2005

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Schlage Lock Company  
v.  
Mark J. Staiano

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Opposition No. 91152703  
to application Serial No. 76278459  
filed on June 29, 2001

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Dyann L. Kostello of Michael Best & Friedrich LLP for  
Schlage Lock Company

Robert C. Faber of Ostrolenk, Faber, Gerb & Soffen, LLP for  
Mark J. Staiano

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Before Walters, Bucher and Kuhlke, Administrative Trademark  
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Mark J. Staiano, seeks registration of the  
mark shown below



for goods ultimately identified in the application as "sunglasses" in International Class 9, "tote bags, luggage trunks, wallets" in International Class 18, "clothing, namely, underwear, jeans, mitten, pants, sleepwear, sweaters, sweat shirts without hoods, sweat shirts with hoods, swim wear, tank tops, socks, sport shirts, sweat pants, t-shirts, bathing trunks, undershirts and footwear, namely thongs" in International Class 25, and "cigars, cigarettes, tobacco, cigarette rolling papers, smoking pipes, matches, tobacco pouches" in International Class 34.<sup>1</sup> The design element is described in the following manner, "the mark consists of the design of an aloe plant."

Opposer, Schlage Lock Company, opposed registration of applicant's mark, on the following grounds: (1) that, as applied to applicant's goods, the mark so resembles opposer's previously used and registered marks KRYPTONITE and KRYPTO formative marks for a wide variety of goods, including tote bags, as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S.C. §1052(d); (2) that applicant's mark is likely to and has diluted opposer's famous marks under Trademark Act Section 43(c), 15 U.S.C. §1125(c); and (3) that applicant's mark is immoral and scandalous under

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<sup>1</sup> Serial No. 76278459, filed June 29, 2001. The application is based on bona fide intent-to-use in each international class under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

Trademark Act Section 2(a), 15 U.S.C. §1052(a). Opposer also pleaded several registrations and set forth allegations that its marks compose a family of KRYPTO formative marks and achieved fame prior to applicant's filing date.

Alleged Admissions

As a preliminary matter, we address opposer's argument that applicant has admitted the allegations regarding the Section 2(a) claim. Opposer's original complaint was filed on August 15, 2002 and applicant filed its answer thereto on November 12, 2002. Thereafter, opposer's motion to amend the complaint filed June 2, 2003 to add paragraph nos. 21 and 22, the Section 2(a) claim, was granted as conceded, applicant was allowed time in which to file an answer to the amended complaint and the trial schedule was reset.

Applicant did not file an answer to the amended complaint; however, opposer went forward with its trial period, including submission of material in support of its 2(a) claim. Applicant then took testimony and submitted evidence during its trial period. For the first time, in its main brief on the case, opposer argues that applicant "by its failure to deny the averments in the Amended Notice of Opposition has admitted them, and those admissions alone are sufficient to enter judgment in [opposer's] favor." Brief p. 9. Applicant, in response, argues that "[l]aying in wait to complain about a formal matter and proceeding through

trial as though the formal matters were correct is not proper procedure and is a waiver by opposer." Brief p. 5. Further, applicant states that "applicant's attorney never received an order mailed from the TTAB that the Motion to file an Amended Notice of Opposition was granted or that Applicant had a set time to answer it" thus applicant has "an explained error, an oversight which neither Opposer commented upon by timely seeking entry of default, nor the Board commented upon by giving notice of failure to file an Answer, and which Applicant was unaware of." Applicant concludes that "Opposer should be viewed as having waived its now late asserted claim of a default, or the fact that Applicant has throughout disputed Opposer's allegations should be sufficient to avoid an effective judgment by default here." Brief p. 5. In reply, opposer essentially argues that it did not waive its right to assert that by operation of the Federal Rules, specifically, Fed. R. Civ. P. 8(d), applicant has admitted the allegations that its mark "consists of immoral and scandalous matter." Reply Brief p. 3.

Paragraph nos. 1-20 in the amended complaint are identical to the original complaint and applicant answered those allegations on November 12, 2002; therefore, the only allegations that could possibly present an issue here, which opposer apparently concedes in its reply brief, are set

forth in paragraph nos. 21 and 22, the Section 2(a) allegations of scandalous and immoral matter. Whether we consider this issue under the good cause standard of Fed. R. Civ. 55 (in the case of default) or under Fed. R. Civ. P. 8(d) regarding admissions of claims by operation of the Rules, we find that, under these circumstances, those allegations have been denied. It is the policy of the law to decide cases on their merits, particularly here, where the matter has been tried and opposer did not seek to move for default on that claim prior to trial or rest its case at trial on the alleged admissions or even acknowledge applicant's failure to respond to the Section 2(a) claim but rather submitted evidence during its trial period and cross-examined during applicant's trial period on that claim. In sum, the issue has been tried and, to the extent necessary, we consider the answer to be amended to conform to the evidence to include denials of paragraph nos. 21 and 22. Fed. R. Civ. P. 15(b).

Evidentiary Objections

We now turn to the evidentiary issues presented by both parties. Opposer, in its main brief, moves to strike applicant's exhibits 1-21 and the testimony of Annette Staiano and accompanying exhibits. Opposer's objections to this evidence and testimony are overruled.

With regard to exhibits 1-21 opposer states that during the discovery period opposer requested applicant to produce "All documents supporting any affirmative defense raised in Applicant's Answer," (Document Request No. 20) and to "Identify all marks which Applicant contends are relevant to this proceeding" (Interrogatory No. 17). Brief p. 8. Although not specifically articulated, we understand opposer's argument to be that exhibits 1-21 constitute responsive documents that should have been produced during discovery and opposer only first received them during applicant's testimony period under notice of reliance. Exhibit nos. 1-19 consist of printouts of third-party registrations from the Trademark Electronic Search System (TESS). A party need not investigate third-party registrations in response to discovery requests, *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1788 (TTAB 2001) (no obligation to search for third-party uses), nor is a party required to specify in detail the evidence it intends to present or identify the witnesses it intends to call. *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1657 (TTAB 2002) (interrogatory requesting that opposer "identify each and every fact, document and witness in support of its pleaded allegations was equivalent to a request for identification of fact witnesses and trial evidence prior to trial and therefore improper). Therefore,

the TESS printouts in exhibit nos. 1-19 and the dictionary definitions in exhibit nos. 20-12 were properly submitted under notice of reliance.

With regard to the testimony deposition of Annette Staiano and accompanying exhibits opposer argues that it did not have time to prepare for the deposition because the documents presented at the deposition were not received by opposer until the eve of the deposition and, with regard to some documents, at the deposition. Again, opposer objects to applicant's timing of trial preparation stating that "[m]any of the documents used in Annette Staiano's deposition consisted of Internet printouts showing third party uses of the marks 'KRYPTO' and 'KRYPTONITE,' some of which were dated in August and September, and provides no explanation as to why its investigation of third party use did not commence until several months after the close of discovery and eight months after applicant responded to Kryptonite's discovery requests" and "[h]ad applicant timely conducted its investigation and produced its documents during the discovery period, Kryptonite would have had an opportunity to consider those documents and consider whether it should conduct further discovery or an additional investigation of its own." Brief p. 8. As stated above, applicant had no duty to conduct an investigation of third-party use during discovery. See Sports Authority, *supra*;

see also, *Polaroid Corp. v. Opto Specs, Ltd.*, 181 USPQ 542, 543 (TTAB 1974) (opposer need not describe evidence it will rely on to support allegations in opposition) and *Charrette Corp. v. Bowater Communication Papers Inc.*, 13 USPQ2d 2040, 2041 (TTAB 1989) (motion to exclude testimony of witness for failure to identify witness during discovery denied).

Opposer is put at no disadvantage here in a Board trial. Opposer had thirty days between the close of applicant's testimony period and the opening of its rebuttal period to prepare any rebuttal against evidence of third-party use. Notably, opposer did not submit rebuttal evidence or take rebuttal testimony.

Applicant moves to strike exhibits 12 and 15 "because they are inappropriate for a Notice of Reliance" and are "the rankest form of hearsay." Brief p. 3. Exhibit nos. 12 and 15 are excerpts from websites. The Board notes, in addition, that exhibit nos. 16 and 24 are also excerpts from websites, exhibit no. 17 is a copy of an article from an online news source and exhibit no. 23 is a listing from a search conducted on the Google search engine. None of these items may be submitted under a notice of reliance. Opposer cites to a 1976 decision to support the proposition that it may submit the printout of a page from a website under a notice of reliance. Opposer also looks to *International Assoc. of Fire Chiefs, Inc. v. H. Marvin Ginn Corp.*, 225

USPQ 940 (TTAB 1985) for support; however, that decision dealt with NEXIS printouts of excerpted stories published in newspapers, magazines, etc. The case on point is *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 1370 (TTAB 1998). In short, the element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet and web pages are not considered the equivalent of printouts from a NEXIS search inasmuch as such printouts are the electronic equivalents of the printed publications, and permanent sources for the publications are identified. In view thereof, applicant's objections are sustained and exhibit nos. 12 and 15 are hereby stricken from the record. *Raccioppi*, supra; Furthermore, for the same reasons, the additional specified exhibit nos. 16, 17, 23 and 24 have been given no consideration. See *Hunt-Wesson Foods, Inc. v. Riceland Foods, Inc.*, 201 USPQ 881 (TTAB 1979) (improper subject matter excluded, although no objection.).

Applicant has also moved to strike the deposition of Chantalle Stocco and accompanying exhibits because the witness conducted her investigation "during the pretrial discovery period and [the documents] could have and should have been supplied to applicant's attorney during or even right after discovery." Brief p. 3. Applicant has failed to state and prove that it served discovery on opposer

requesting such information. In view thereof, applicant's objection to the Chantalle Sacco deposition and accompanying exhibits is overruled.

The evidence of record, therefore, includes the pleadings herein, the file of the opposed application, the testimony depositions of Chantalle Stocco and accompanying exhibits and Annette Saiano and accompanying exhibits.

In addition, opposer properly submitted, under a notice of reliance, the status and title copies of its pleaded registrations, dictionary definitions of the words "toke" and "grass," pages from Relix and Headquest magazines, and the file history of Registration No. 2244791. Applicant submitted, under notice of reliance, printouts from the USPTO TESS database of several third-party registrations, the dictionary definition of KRYPTONITE, and opposer's response to applicant's interrogatories nos. 28 and 29.

We will now address each claim in turn.

Likelihood of Confusion under Section 2(d)

As noted above, opposer pleaded several registrations. The registrations, all of which are in full force and effect and owned by opposer, are summarized as follows:

- Registration No. 1002571, which is of the mark KRYPTONITE (in typeset form) for "locking mechanisms, namely, locks for bicycles and the like" in International Class 6 filed April 1, 1974, issued on January 28, 1975;

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- Registration No. 1352416, which is of the mark KRYPTONITE-5 (in typeset form) for "metal locking mechanisms, namely, locks for bicycles, mopeds, motorcycles, and the like" in International Class 6, filed on January 24, 1985 issued on August 6, 1985;

- Registration No. 2244791, which is of the mark KRYPTONITE (in typeset form) for "bicycle parts specially adapted for mounting on bicycles, namely, the following, duffel bags and carriers for mounting on bicycle racks, crossbars, and handlebars: in International Class 12 and for "commuter bags for bicyclists, namely, tote bags, travel bags, duffel bags, briefcases, messenger bags" in International Class 18 filed January 9, 1995, issued on May 11, 1999;

- Registration No. 2269238, which is of the mark KRYPTONITE (in typeset form) for "metal locks, metal locking mechanisms, metal security cable, metal integrated locks and cable" in International Class 6, filed October 5, 1998, issued on August 10, 1999;

- Registration No. 2332840, which is of the mark KRYPTO (in typeset form) for "metal locks, and integrated locks and cable" in International Class 6, filed May 17, 1999, issued on March 21, 2000;

- Registration No. 2330279, which is of the mark KRYPTO DISCO (in typeset form) for "metal locks for scooters and motorcycles" in International Class 6, filed June 1, 1998, issued on March 14, 2000;

- Registration No. 1416395, which is of the mark KRYPTO LOK (in typeset form) for "metal locking mechanisms, namely, locks and carrying brackets for use therewith for bicycles, mopeds, motorcycles, and the like" in International Class 6, filed February 10, 1986, issued on March 13, 1990;

- Registration No. 1416395, which is of the mark KRYPTO LOK (in typeset form) for "metal locking mechanisms, namely, locks and carrying

brackets for use therewith for bicycles, mopeds, motorcycles, and the like" in International Class 6, filed February 10, 1986, issued on March 13, 1990;

- Registration No. 2003582, which is of the mark KRYPTOFLEX (in typeset form) for "metal security cable" in International Class 6, filed November 14, 1994, issued on September 24, 1996;

- Registration No. 2247281, which is of the mark KRYPTOKOIL (in typeset form) for "metal integrated lock and cable" in International Class 6, filed October 6, 1997, issued on May 25, 1999; and

- Registration No. 2254953, which is of the mark KRYPTOVAULT (in typeset form) for "metal locks" in International Class 6, filed October 6, 1997, issued on June 22, 1999.

Because opposer has made its pleaded registrations of record, and because its likelihood of confusion claim is not frivolous, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Additionally, because opposer has made its pleaded registrations of record, priority is not an issue in this proceeding. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In

re E. I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Moreover the goods need not be identical or directly competitive in order for there to be a likelihood of confusion. Rather, the respective goods need only be related in some manner or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Opposer pleaded and argued that its marks comprise a family of marks incorporating the KRYPTO element and that its marks are famous. The only evidence applicant has submitted in support of these two allegations are the above-listed registrations. "Simply using a series of similar marks does not of itself establish the existence of a family." J & J Snackfoods Corp. v. McDonald's Corp., 932 F.2d 1360, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). In order

to prove a family of marks, opposer would need to submit evidence or testimony to show that it promotes its marks together. Id. Opposer has not submitted any evidence with regard to how its marks are promoted and perceived by consumers; therefore, we find that opposer has not established a family of marks. Similarly, as to fame, the fact that opposer's mark KRYPTONITE has been registered since 1978 and that the registrations for that mark are incontestable does not, without more, lead to the conclusion that they are famous; therefore, we find that opposer has not established that its marks are famous.

Turning now to consider the goods identified in all of opposer's pleaded registrations, except for Registration No. 2244791, we find that the record does not establish that such goods are sufficiently similar or related to applicant's identified goods that, if used on or in connection with confusingly similar marks, confusion as to source is likely. Opposer's testimony and accompanying exhibits showing registrant's various metal locks, cables and carrying brackets sold in the same large discount retail establishment (e.g., Target) as applicant's sunglasses, clothing and footwear, is not sufficient evidence, without more, upon which the Board may find the goods to be similar or related. By opposer's logic, based on the evidence of record we could also find swimsuits and bicycle tires to be related goods. The mere fact that a consumer can purchase a

gallon of milk and a car battery at these establishments does not lead to the conclusion that car batteries and milk are related under relevant trademark law.

With regard to Registration No. 2244791, we find that applicant's tote bags and luggage trunks in International Class 18 are related and/or similar to opposer's "duffel bags and carriers for mounting on bicycle racks, crossbars, and handlebars" in International Class 12 and opposer's "commuter bags for bicyclists, namely, tote bags, travel bags, duffel bags, briefcases, messenger bags" in International Class 18. In particular, applicant's tote bags encompass opposer's tote bags for bicyclists and, as such, are legally identical goods.

In addition, inasmuch as there are no limitations in the applicant's identification of goods we presume that the trade channels overlap, at a minimum, to the extent that applicant's goods encompass opposer's goods in Registration No. 2244791, and that the goods would be offered to all normal classes of purchasers. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

We now turn to the first du Pont factor, i.e., whether applicant's mark and opposer's marks are similar or dissimilar when compared in their entireties in terms of

appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles. The test, under the first du Pont factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The appearance of applicant's mark is substantially different from opposer's marks in view of the prominent design portion of applicant's mark, which is larger than the words and includes the stylized lettering KK that frames the word portion. In addition, the word portion is stylized in a manner that emphasizes the K's which ties the word into the KK leaf design. The word portion of applicant's mark

shares a similar beginning, KRYPTO, with registrant's marks but the similarity in sound ends there. The connotation of applicant's mark is also different from opposer's marks in view of the second portion of applicant's mark, KING. As used in each mark, the connotation of KRYPTO is simply not clear from this record, thus we cannot find that there is a similar connotation. Rather the connotations come from the other elements in the marks which are wholly different (KING v. LOK, KOIL, FLEX and VAULT). Further, we find the overall commercial impressions of the marks are not similar. The similarity of the first part of the word portion of the parties' marks is overshadowed by the visual and phonetic dissimilarities, and further distinguished by the stylized KK lettering incorporated in the design element in applicant's mark. With regard to opposer's KRYPTONITE marks, we find that the shared KRYPTO portion has even less significance inasmuch as KRYPTONITE is one word that is defined as "any surviving fragment of the exploded mythological planet Krypton, home of Superman." Webster's Millennium Dictionary of English, Lexico Publishing Group, LLC (2003). Therefore, we find that KRYPTO is not the dominant portion of KRYPTONITE. In view of the above, we find, as to each of opposer's registrations, that the parties' marks are not similar.<sup>2</sup>

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<sup>2</sup> We note that applicant has submitted several examples of

Finally, we note applicant's argument regarding opposer's agreement with a third-party that may limit opposer's use of the mark KRYPTONITE to locks. First, to the extent applicant is arguing a defense of unclean hands, this defense was not pleaded or tried and cannot be considered. Moreover, to the extent applicant's argument that opposer's use on goods other than locks is "illegal," this would constitute an impermissible attack on a pleaded registration and no counterclaim has been filed.

We conclude that the evidence of record as it pertains to the relevant du Pont factors does not support a finding of likelihood of confusion as to any of opposer's registrations. With regard to Registration No. 2244791 we also find that confusion is unlikely to result from contemporaneous use of opposer's mark and applicant's mark, even where the marks are used on identical goods marketed in the same trade channels to the same class of purchasers. We find that the dissimilarity of the marks simply outweighs the other relevant du Pont factors. *Kellogg Co. v. Pack'em*

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third-party registrations and use of KRYPTO formative marks, but very few are of probative value. See e.g., Exhibit No. 7 Registration No. 1803187 for the mark KRYPTONICS for shock absorbers, compression bumpers, and brake pads for bicycles; and Registration No. 1239506 for the mark KRYPTONITE for clothing, namely, t-shirts. Many of these registrations and examples of use are for use in connection with goods different from opposer's and applicant's respective goods and thus are of no probative value as to the du Pont factor of "the number and nature of similar marks in use on similar goods." *Du Pont*, *supra*.

Enterprises Inc., 14 USPQ2d 1545 (TTAB 1989), aff'd, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Dilution Under Section 43(c)

A prerequisite for a dilution claim is that the plaintiff's mark is famous. *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164 (TTAB 2001). As noted above, opposer has not proven fame, therefore its dilution claim must fail.

Immoral and Scandalous Under Section 2(a)

Registration of a mark which consists of or comprises immoral or scandalous matter is prohibited under Section 2(a) of the Trademark Act. In re *Boulevard Entertainment, Inc.*, 334 F.3d 1336, 1339, 67 USPQ2d 1475, 1477 (Fed. Cir. 2003) citing In re *Mavety Group, Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994). Further, our reviewing court stated as follows:

...the PTO must consider the mark in the context of the marketplace as applied to the goods described in the application for registration. [citation omitted] In addition, whether the mark consists of or comprises scandalous matter must be determined from the standpoint of a substantial composite of the general public (although not necessarily a majority), and in the context of contemporary attitudes, [citation omitted], keeping in mind changes in social mores and sensitivities.

In re *Boulevard Entertainment, Inc.*, 334 F.3d 1336, 1339, 67 USPQ2d 1475, 1477. See also In re *McGinley*, 660 F.2d 481, 485, 211 USPQ 668, 673 (CCPA 1981).

Thus, whether a mark comprises immoral and scandalous matter is to be ascertained in the context of contemporary attitudes, and the relevant viewpoint is not necessarily that of a majority of the general public, but of a "substantial composite." *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999) citing *In re Mavety*, 33 F.3d 1367, 1371, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994). Further, we must consider the mark in the context of the marketplace as applied to only the goods described in the application for registration. *In re Mavety Group, Ltd.*, 33 F.3d 1367, 1371, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994).

In this case, opposer has not submitted any evidence concerning the viewpoint of a substantial composite of the general public or contemporary attitudes. Based solely on opposer's speculation and dissection of the mark, opposer argues that the mark contains the design of a marijuana leaf and the word "taking," which is defined as "a puff on a marijuana cigarette or pipe." *Merriam-Webster Dictionary* (2003). Opposer attempts to put the mark into the context of the marketplace by submitting examples of advertising in a magazine and concludes that "it is quite clear"

that applicant's goods "are designed for marijuana smoking."<sup>3</sup> Brief p. 16.

We note that the goods for which applicant seeks registration are legal and may be used in connection with legal goods. Thus, taken in the context of the goods for which application is sought, there is no evidence in the record to support a finding that: (1) a substantial composite of the general public would perceive the leaf design in this mark as a marijuana leaf rather than, for example, an aloe leaf, as the mark is described in the application;<sup>4</sup> (2) a substantial composite of the general public would parse out the single stylized word KRYPTOKING with emphasis on the double KK's to find the word toking and know its meaning; and, most critically, (3) a substantial composite of the general public would find use of the mark immoral or scandalous as used on the identified goods. In view thereof, we find that opposer has not met its evidentiary burden to succeed on this claim.

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<sup>3</sup> We note that some of opposer's evidence submitted in support of its Section 2(a) claim has been stricken. However, this evidence does not address the viewpoint of a substantial composite of the general public as to the mark for which application is sought; therefore, even if we considered that evidence it would not alter our decision.

<sup>4</sup> Four excerpts from two publications do not provide sufficient evidence to make any determination as to how the general public views this mark, and, in particular, in connection with the goods listed in the application. Nor is there any evidence to establish what a marijuana leaf looks like.

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**Decision:** The opposition is dismissed as to all claims.